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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 529

EARL WELCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. Rs 1–13)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1966 (Pet. Rs 1), and a petition for rehearing was denied on August 9, 1966 (Pet. Rs 14). The petition for a writ of certiorari was filed on Sep-

[1] "Rs" refers to the appendix to the petition for a writ of certiorari, and "Ra" refers to the three-volume printed record used in the court of appeals. These are the record reference forms which petitioner has employed. See Pet. 2, n. 1.

tember 7, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in denying petitioner's request for a copy of his grand jury testimony.

2. Whether petitioner was denied a fair trial because of publicity appearing before and during the trial.

3. Whether the trial court erred in admitting evidence of petitioner's purchase of a home in 1953 for a woman who was not his wife.

STATEMENT

After a trial by jury, petitioner, a former Justice of the Supreme Court of Oklahoma, was convicted in the Eastern District of Oklahoma (to which the case had been transferred for trial on petitioner's motion) on five counts charging him with wilfully attempting to evade his income taxes for 1957 through 1961, by filing false and fraudulent income tax returns (Ra 1–4). Petitioner was sentenced to concurrent prison terms of three years and was fined a total of $13,500 (Ra 25, 40–41).

The government proved its case by the net worth method. The government's schedule showed that more than $41,000 of income had been unreported in the years 1957–1961 and that, for these years, approximately $12,800 in income taxes had been evaded (Ra 347–352). Petitioner's defense was that he possessed

a cash hoard of more than $50,000 by the beginning of 1933 (Ra 390–391, 395). Rebutting this defense, the government introduced proof that petitioner's former wife had no knowledge of accumulated funds at that time (Ra 50–51), and that petitioner was continuously in debt, and paying substantial interest, from 1928 through 1951 (Ra 53, 183–194, 201–204; Exs. 68, 88B, 136–139, 226).

ARGUMENT

1. The district court did not err in refusing to direct that a copy of petitioner's grand jury testimony be given to him. Prior to the recent amendment of Rule 16, F.R. Crim. P., it had generally been held that a defendant had no right to production of his own volunteered grand jury testimony. *United States* v. *Johnson,* 337 F. 2d 180, 196–197 (C.A. 4), affirmed on another issue, 383 U.S. 169; *United States* v. *Kahaner,* 203 F. Supp. 78, 85–87 (S.D.N.Y.), affirmed, 317 F. 2d 459 (C.A. 2), certiorari denied *sub nom. Keogh* v. *United States,* 375 U.S. 836; *United States* v. *Wortman,* 26 F.R.D. 183, 206 (E.D. Ill.); *United States* v. *Gilboy,* 160 F. Supp. 442, 462–463 (M.D. Pa.). Amended Rule 16 entitles a defendant, upon demand, "to inspect and copy or photograph any * * * recorded testimony of the defendant before a grand jury." That amendment was adopted in February 1966, more than 16 months after the trial in the present case, and was to become effective in July 1966. It obviously could not have been anticipated by the district court in the present trial. And since the rule is now in effect, the issue pre-

sented by petitioner is of no continuing importance.

Nor does this case involve the question decided in *Dennis* v. *United States*, 384 U.S. 855, where this Court held that the grand jury testimony of certain key government witnesses should have been given to the defense for use in cross-examination. The grand jury testimony being sought here was that of the defendant on trial; the defense plainly could not have used it to test the credibility of any government witness. Consequently, the court of appeals concluded correctly that this case was not covered by this Court's ruling in *Dennis*.[2]

2. There is no substance to petitioner's claim that newspaper articles before and during his trial rendered it unfair (Pet. 19–29). Adequate precautions were taken to insure that petitioner would not be prejudiced by the publicity, and petitioner has presented no showing that the proceedings were actually influenced by the newspaper reports. On petitioner's motion, the case was transferred from Oklahoma City (the Western District of Oklahoma) to Muskogee (in the Eastern District). The prospective jurors were thoroughly examined for bias before petitioner's trial. Each of the 32 persons from whom the jurors

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[2] It should be noted that petitioner was given pre-trial access to a substantial portion of the government's evidence. More than two months before trial he was given copies of all documents in the government's possession which had been obtained from him or from third parties in the course of the Internal Revenue Service's investigation. Three weeks before trial he was given copies of the other exhibits and schedules which the government proposed to introduce in evidence. See the government's bill of particulars (Ra 10).

and alternates were selected was questioned by petitioner's counsel on *voir dire*. Ten of them indicated they had not read about the case, although two of them said they had heard of it on television. Five others indicated they had read of the case only at the time of the indictment. One prospective juror said that he remembered only the charges involved and another said that all he recalled about the case were headlines at the time of the indictment and an article stating that the trial would be conducted by a St. Louis judge. Each of the 32 prospective jurors stated he had formed no opinion as to petitioner's guilt or innocence and could fairly and impartially try the case. Each said he would base his verdict solely on the evidence as it came from the witnesses on the witness stand and the instructions of the court. None was challenged for cause (Ra 90–154).

At the outset of the trial, the court warned all prospective jurors that they were not to read anything with respect to the case in any publication of any kind, nor were they to listen to anything on radio or television or talk with anyone or let anyone talk to them about the case (Ra 89, 116, 154–155, 510–511). The court gave the jury the same admonition at each noon recess and at the end of each day of the trial (Ra 47–48).

Petitioner did not request that the jury be sequestered. He did not call to the court's attention any news article appearing during the trial and did not ask that the jury be questioned concerning any particular trial publicity. Prejudicial trial publicity

was alleged for the first time in petitioner's motion for new trial (Ra 32–34).

Petitioner's post-trial investigations concerning the effect of publicity upon the jurors (Ra 499–505, 510–511) produced no evidence to support his claim that publicity had prejudiced the jurors against him.[3] In light of all these precautions, and the absence of any proof that publicity affected the fairness of the trial, this case is a far cry from those on which petitioner relies such as *Sheppard* v. *Maxwell*, 384 U.S. 333, *Estes* v. *Texas*, 381 U.S. 532, and *Rideau* v. *Louisiana*, 373 U.S. 723. And since there is no showing whatever that any juror read the newspaper articles published during trial to which petitioner objects, this Court's decision in *Marshall* v. *United States*, 360 U.S. 310, is plainly inapposite.

Since the publicity did not reach or affect the jury, its source is irrelevant. In any event, there is no substance to petitioner's added allegation that government misconduct was responsible for the assertedly

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[3] The affidavit of alternate juror Crawford, to which petitioner refers, and petitioner's unsupported allegations that newspaper accounts of the trial were displayed prominently in the courthouse and in the hotel where four jurors allegedly stayed (Pet. 12, 24–25), were mentioned for the first time in petitioner's motion for new trial (Ra 34), filed the day before the hearing thereon. The Crawford affidavit (Rs 14–15) did not state that the jurors were exposed to any publicity or that they had prejudged the case. Although petitioner was afforded an evidentiary hearing on his motion for new trial (Ra 499–500), he did not call Crawford as a witness or adduce any testimony in support of his allegations that prejudicial publicity must have been brought to the attention of the jury.

prejudicial newspaper articles (Pet. 20–21). At the public sentencing hearing of another former Justice of the Oklahoma Supreme Court who pleaded *nolo contendere* to tax evasion charges more than three months before petitioner's trial, government counsel reported to the court that the prosecution had been prepared to offer testimony concerning a $150,000 bribe which the defendant in that case had accepted. That information was relevant to the sentencing hearing, and it was appropriate for counsel to report it to the court. The fact that the defendant in that case was a possible witness in petitioner's trial did not disable the government from making the necessary disclosure. Nor was petitioner's trial rendered unfair merely because newspaper reports, in describing the witness when he was called, referred to the tax-evasion charges against that witness and to the alleged bribe offer. Indeed, petitioner's own counsel, in conducting a *voir dire* examination of the prospective jurors, was the one who called to the jurors' attention the fact that "some other justice or member of the [Oklahoma Supreme] court has been found guilty of some reprehensible conduct" (Ra 119; see also Ra 103, 108, 130, 141), and received the jurors' assurances that they would not allow such evidence to affect their judgment of the charges against petitioner.

Nor did the district court err in rejecting petitioner's request that the testimony of the former Oklahoma Supreme Court Justice and the witness who was alleged to have given him the bribe be heard in cham-

bers.[4] Rule 26, F.R. Crim. P., provides that "testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules." The court excused the jury and heard the testimony of the witnesses in open court before ruling on the admissibility of their testimony (Ra 68, 71). This course was proper, and there is no showing whatever that the witnesses' testimony came to the jury's attention as a result of the newspaper reports.

3. Petitioner's final contention (Pet. 30–35) is that the trial court erroneously permitted the government to introduce evidence showing that he spent $7,698.45 for the purchase of a home in 1953. In order to rebut petitioner's defense that he possessed a cash hoard, the government introduced evidence showing that petitioner could not have saved more than $36,750.74 as of January 1, 1933, and that, in any event, he spent $54,272.45 more than his reported income during the years 1933–1955. The amount spent for the house in 1953 was introduced as part of this line of proof, and it was plainly relevant for that purpose (Ex. 224; Ra 323–325, 356–357, 361). Such tracing of a defendant's financial history for

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[4] The evidence was offered for the purpose of showing a likely source of petitioner's unreported income. See *Holland* v. *United States*, 348 U.S. 121, 137–138; *United States* v. *Ford*, 237 F. 2d 57, 65 (C.A. 2), certiorari granted, 352 U.S. 1000, dismissed on grounds of mootness, 355 U.S. 38; *Massei* v. *United States*, 241 F. 2d 895, 904 (C.A. 1), affirmed on another ground, 355 U.S. 595.

the purpose of establishing an opening net worth figure and rebutting a cash hoard defense has been approved by this Court. *Holland* v. *United States*, *supra*, pp. 133–134; *Friedberg* v. *United States*, 348 U.S. 142; *Smith* v. *United States*, 348 U.S. 147, 157–158. The fact that such proof may collaterally have suggested that petitioner was involved in some personal impropriety did not render the evidence inadmissible.[5]

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[5] Petitioner's counsel has advised us that he intends to file a motion to supplement his petition, in which it will be contended that insofar as the court of appeals rejected the claim that it was error not to produce for defense inspection the grand jury testimony of a government witness whose grand jury testimony was not recorded (Rs 12), the decision below conflicts with that in *Lenske* v. *United States*, decided by the Court of Appeals for the Ninth Circuit on October 5, 1966 (Nos. 19,539 and 20,448). The *Lenske* decision is inapposite, however, because a majority of the court of appeals determined in that case that "the Government so arranged matters" (slip opinion, p. 14) that stenographic reports of certain grand jury witnesses would be available while such reports would be unavailable as to other witnesses. In the present case there is no basis for ascribing such intentional tactics to the government. In any event, no decision of this Court has ever suggested that the government owes an obligation to a prospective defendant to record stenographically minutes of the testimony of all grand jury witnesses. Petitioner's contention that the government was obliged to produce a transcript which did not exist and that his conviction may be reversed for failure to make such production would impose such a duty.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1966

No. 529

EARL WELCH,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF AND REQUEST TO SUPPLEMENT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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